

# PHYSICAL THERAPY BOARD OF CALIFORNIA

## INITIAL STATEMENT OF REASONS

**Hearing Date:** May 1, 2008

**Subject Matter of Proposed Regulations:** Model Guidelines for Issuing Citations and Imposing Discipline

**Section(s) Affected:** 1399.15

### **SPECIFIC PURPOSE:**

Senate Bill 523 (Stats. 1995, Chapter 938; Kopp) provides that a penalty in any administrative disciplinary action may not be based on a guideline unless it has been adopted as a regulation in accordance with the Administrative Procedures Act. (Government Code Section 11425.50(e); Operative 07/01/97 [Stats. 1995, Chapter. 938, Sect. 98])

On January 31, 1997 the Board adopted the document entitled "Disciplinary Guidelines" and subsequently incorporated the guidelines by reference into regulation later that year. On May 13, 2005 adopted the 2<sup>nd</sup> edition of the guidelines and renamed them the "Model Guidelines for Issuing Citations and Imposing Discipline".

The Model Guidelines for Issuing Citations and Imposing Discipline (Model Guidelines) is a manual addressing public protection while enabling the licensee to practice their profession in a controlled environment.

The Board is proposing to produce the 3rd edition of the Model Guidelines and to incorporate them into regulation by reference which includes additional violations and modifications of the penalties to be consistent and appropriate to the practice of physical therapy today. Additionally, there have been changes to the physical therapy laws and regulations that are not reflected in the May 13, 2005 publication of the Model Guidelines thereby hindering the Board's ability to effectively impose an action when these laws or regulations have been violated.

To comply with provisions of SB 523 the Board proposes to repeal the existing document adopted May 13, 2005 and replace it with "Model Guidelines for Issuing Citations and Imposing Discipline", 3rd Edition (2008) and to incorporate it by reference with this action.

### **FACTUAL BASIS:**

The Physical Therapy Board of California is mandated to protect the health, safety, and welfare of California Consumers. The Board's highest priority is to protect consumers by utilizing its authority to investigate complaints and take appropriate disciplinary action

against licensees and applicants for licensure who endanger the health and safety of consumers.

Sections 2660, 2660.1, 2661 and 2661.5 of the Business and Professions Code specify the grounds for which the Board may discipline a physical therapist or physical therapist assistant. Many violations involve unprofessional conduct which include, but is not limited to, the following:

**Incompetence** – The lack of possession of or the failure to exercise that degree of learning, skill, care, and experience ordinarily possessed and exercised by a competent physical therapist or physical therapist assistant.

**Gross Negligence** – An extreme departure from the standard of care which, under similar circumstances, would have ordinarily been exercised by a competent physical therapist or physical therapist assistant.

**Conviction of A Crime** - An act substantially related to the qualifications, functions, or duties of a physical therapist or physical therapist assistant. Examples include convictions involving sexual misconduct or illegal possession or use of dangerous drugs.

**Aiding and Abetting** – Affording an unlicensed person to practice physical therapy without a license. Examples include a physical therapist assistant or physical therapy aide performing physical therapy without supervision as prescribed by law.

Not all violations of the Physical Therapy Practice Act are of such nature or severity that they warrant revocation of a license. In some cases, a lesser penalty such as a public reproof or a period of probation is sufficient to ensure consumer protection and in the less egregious cases the issuance of a citation is sufficient. The Board's Model Guidelines are intended to assist administrative law judges, deputy attorney generals, Board members and staff in selecting the most appropriate consequence for a licensee who has violated the laws and regulations governing the practice of physical therapy and for the consumer or licensee to be educated on the consequences of violating the Physical Therapy Practice Act whether it be the issuance of a citation for the less egregious violations or revocation for the most egregious violation.

The specific purpose is to comply with section 11425(e) of the Government Code.

The following describes the basis for the proposed revisions to the proposed amended edition of the Board's Model Guidelines:

1) Responsible Governmental Members

The Director and all of the Physical Therapy Board Members names are being changed to the names of those currently holding the positions.

2) Publication Date and address of the Physical Therapy Board of California

The publication date of the 3rd edition will be updated to reflect the date the Board adopts the amendments to the Model Guidelines. The location of the Board office will change on March 14, 2008; the address will be changed accordingly.

3) Table of Contents

The Table of Contents will be amended to include the adoption date of the 3<sup>rd</sup> addition of the Model Guidelines. Once adopted, the page numbers will be changed to reflect the changes in the text.

4) Statement of Purpose, Intent & Expectations

The statement “All violations of the Physical Therapy Practice Act are misdemeanor violations and some are felony violations; therefore, criminal charges should be sought when appropriate”, was deleted, since the decision to file criminal charges would be sought at the investigate level.

Additionally, there were grammatical changes for clarity.

5) Citation and Fine Order

Section 1399.25 of the California Code of Regulations, Title 16, Division 13 is in the process of being amended and section 1399.26 is being repealed. Repealing section 1399.26 eliminates identifying specific statutes and regulations which are subject to a citation; therefore the reference to section 1399.26 is being deleted.

The additional changes to the text of the Model Guidelines is to make specific that the citation shall be in writing; shall be specific to the statute or regulation alleged to have been violated; payment of a fine, with or without an informal conference or administrative hearing, is not an admission of guilt; payment shall constitute satisfactory resolution; at the conclusion of the informal conference the Executive Officer may affirm, modify or dismiss the citation; and, provides an option to request an administrative hearing whether or not an informal conference was held.

6) Public Reproval

Changes are grammatical.

7) Guidelines Specific to Violation

A) There are grammatical changes in the introduction.

B) Some statute and regulation titles were changed for clarity.

C) On some statutes or regulations, the current Model Guidelines identified a minimum and maximum citation fine but were void of a minimum or maximum level of discipline. Since it was determined that these violations may be minor in most instances there could be instances where they were more egregious and would warrant discipline. Consequently, the level of discipline was added to sections 490.5, 2068,

2271, 2620.3, 2622, 2640, 2650.1, 2653, 2655.7, 2655.91, 2655.93, 2684, 2691, 1398.6, 1399.10 and 1399.12.

D) The following violation code sections will be **added** to the guidelines since they are subject to citation or discipline if violated:

- ❖ Business & Professions Code sections 136 and 2608.5
- ❖ Title 16, California Code of Regulations sections 1398.6, 1398.26.5, and 1398.38,

The following violation code sections will be **deleted**:

- ❖ Business & Professions Code sections 2278, 2305, 2306, due to lack of authorization to cite since it is a statute specific to the Medical Practice Act and does not apply to physical therapy;
- ❖ Title 16, California Code of Regulations sections 1398.12, section repealed from regulation.

8) Changes to Standard Probation Conditions and Probation Conditions Specific to Violation

A) Standard Probation Conditions

Condition #2, requires specific number of days or months of suspension to be indicated in the discipline order and deletes language directing the user to view the guidelines for appropriate periods of suspension.

Condition #4, clarifies the respondent must stay in compliance in all jurisdictions and requires the respondent to notify the board of an arrest within five days of the arrest.

Condition #12, specifies conditions for working with a registry or temporary service agency.

Condition # 13, prohibits supervising any individuals accumulating hours or experience in a learning capacity.

Condition #15, requires respondent to immediately notify the probation monitor if hours are less than 192 in a three-month period.

Condition #17, specifies failure to comply with any component of any of the probationary terms and conditions is a violation of probation.

Condition #18, requires respondent to comply with all financial obligations of the discipline order within 180 days of completion of the probation unless state otherwise.

Condition #20, indicates respondent is responsible for payment of cost of all examinations.

All other changes to the Standard Probation Conditions are technical and nonsubstantive.

## B) Probation Conditions Specific to Violation

Condition A, affords respondent opportunity to request for approval by the board to remove the restriction of practice when no longer necessary.

Condition H, allows respondent to gain approval of a licensed physical therapist to act as a probation monitor when there is no practice monitor from the approved pool of physical therapists available. Adds clarity as to when respondent is required to pay the practice monitor.

Condition J, requires respondent to notify patient of prohibition of services each time the respondent treats the patient. Authorizes the board's probation monitor to approve any qualified professional to determine competency of respondent.

Condition L, gives respondent option to request approval to supervise a physical therapist assistant after one year of probation providing the respondent has been in full compliance during that year.

Condition M, gives respondent option to request approval to supervise a physical therapy aide after one year of probation providing the respondent has been in full compliance during that year.

Condition O, requires respondent to notify the patient of his or her probation in writing and that written acknowledgement by the patient shall be maintained in the patient record. The acknowledgement is required to include specific language as specified in this condition.

Condition S, indicates that the diversion program, instead of the board, determines successful completion of diversion; respondent shall be immediately suspended for failure to comply with diversion terms, requires respondent to sign a release authorizing the diversion program to release reports at the request of the board and when the board's diversion program is deemed unavailable, the board may approve an alternate program

Condition U, responsibility is placed on respondent to incur the cost of an ordered education course.

Condition V, responsibility is placed on respondent to incur the cost of an ordered psychiatric evaluation.

All other changes to the Probation Conditions Specific to Violation are technical and nonsubstantive.

## C. Glossary of Terms

Citation and Fine Order – the titled was renamed to Citation only and the reference to the public record maintenance of seven years was deleted since a Citation remains a public record as long as has not been destroyed. Staff may not destroy the record exactly on the last day of the seventh year therefore the record will remain public until actual destruction.

Letter of Public Reproval – deleted the reference that a public reproval could be in lieu of filing a formal accusation since there is no authority to issue a public reproval without filing a formal accusation.

#### D. Alphabetical Violation Index

The statute and regulation titles were changed in the index to reflect the changes to the titles in the text.

#### **UNDERLYING DATA:**

- A. SB 523 (Kopp) Stats. 1995, Chapt. 938
- B. Model Guidelines for Issuing Citations and Imposing Discipline adopted by the Board May 1, 2008.

#### **SMALL BUSINESS IMPACT:**

These regulations will not have a significant adverse economic impact on small businesses.

#### **SPECIFIC TECHNOLOGIES OR EQUIPMENT:**

This regulation does not mandate the use of specific technologies or equipment.

#### **CONSIDERATION OF ALTERNATIVES:**

No reasonable alternative which was considered or that has otherwise been identified and brought to the attention of the Board would be either more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed regulation.

The Board is required to take this action pursuant to SB 523.

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